BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Penalty Relief-Modification of Probation:	)	
	)	**OAH No: L2007010757**
STEPHEN PAUL RIFKIND, M.D.	)	
	)	**Case No: 20-2004-154724**
Physician's and Surgeon's Certificate No. G-38687	)	
Respondent.	)	

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective at 5:00 p.m. on July 19, 2007.

DATED June 19, 2007

MEDICAL BOARD OF CALIFORNIA

Barbara Yaroslavsky

Barbara Yaroslavsky
Chair, Panel B
Division of Medical Quality

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Modification of Probation of **STEPHEN PAUL RIFKIND, M.D.** **P.O. Box 30362** **Santa Barbara, CA 93130** **21 East Ocean View** **Santa Barbara, CA 93108** **Physician and Surgeon's Certificate No. G 38687** **Petitioner.**	**OAH No. L2007010757** **MBC Case No: 20-2004-154724**

PROPOSED DECISION

This matter came on regularly for hearing before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, on March 20, 2007, at Los Angeles, California.

Petitioner, Stephen Paul Rifkind (Petitioner) was present and represented himself.

Pursuant to the provisions of Government Code Section 11522, the Attorney General of the State of California was represented by Klint James McKay, Deputy Attorney General.

Oral and documentary evidence was received. The record was held open to and including April 10, 2007, for Petitioner to submit an additional declaration, and until April 17, 2007, for the Deputy Attorney General to offer objections to the declaration.

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The declaration of Michael V. Stulberg, M.D. (Stulberg declaration) was timely received. It was marked as Exhibit 39 for identification.

A letter from Deputy Attorney General McKay objecting to various aspects of the Stulberg declaration was timely received. It was marked as Exhibit 40 for identification.

On April 4, 2007, the Administrative Law Judge received a faxed letter from Petitioner, objecting to the McKay letter. Nothing in Petitioner's letter indicated that a copy was sent to Mr. McKay. Petitioner's April 4, 2007 letter was marked as Exhibit 41 for identification. On April 6, 2007, the Administrative Law Judge issued a notice and order regarding the ex parte communication, permitting comment on the ex parte communication to and including April 17, 2007.

On April 17, 2007, the Administrative Law Judge received a letter from Deputy Attorney General McKay responding to Exhibit 41. That letter was marked as Exhibit 42 for identification.

On April 17, 2007, the record was closed, and the matter was deemed submitted for decision.

POST-HEARING ISSUES

In Exhibit 40, objections were raised to the Stulberg declaration (Exhibit 39) on grounds that it was overbroad and contained inadmissible hearsay. The objections are overruled.

The Stulberg declaration consists of 22 paragraphs, each of which relates either to Dr. Stulberg's qualifications to render an opinion as to whether Petitioner is an addict, or to the substantive issue of whether Petitioner is an addict.

The hearsay objections do not specify which statements in the Stulberg declaration are inadmissible. Reference is made only to "a variety of hearsay assertions" and "extraneous comments about the Diversion program, Respondent's [sic] therapy, and other hearsay." Those objections are insufficiently specific and are overruled.

The remainder of Exhibit 40 (sections II and III) consists of argument that does not relate to the Stulberg declaration. That argument is made under the heading "THE TESTIMONY OF RESPONDENT [*sic*] ESTABLISHES THAT HE IS NOT YET CAPABLE OF PRACTICING MEDICINE" with sub-headings "Respondent [*sic*] Has No Support Network" and "Even Respondent's [*sic*] Brief Practice Demonstrates The Risk In Restoring His License," and the heading "CONCLUSION." Those sections of Exhibit 40 appear to be a continuation of the oral closing argument the Deputy Attorney General offered during the hearing.

In Exhibit 41, Petitioner objected to sections II and III of Exhibit 40 on grounds that they went beyond the scope of what the Administrative Law Judge had permitted as a response to the Stulberg declaration. In Exhibit 42, the Deputy Attorney General argued that sections II and III of Exhibit 40 were necessary because the Stulberg declaration was "in essence, a closing brief." The Deputy Attorney General also argued that the entire Stulberg declaration constitutes hearsay.

As referenced above, the objection to the Stulberg declaration on grounds that it is overbroad is overruled. The declaration did not constitute a "closing brief," but instead limited itself to the addiction issue.

Other than Petitioner's testimony, the record in this case is limited to 42 documentary exhibits. If the Administrative Law Judge were to exclude the Stulberg declaration on hearsay grounds, it would necessitate the exclusion of the other exhibits on the same grounds. This would leave only Petitioner's testimony which, if found credible, would justify the relief sought. That effect is not one contemplated by Business and Professions Code section 2307. Except for Exhibits 35, 36 and 37, which were excluded on foundational grounds, and Exhibits 40, 41 and 42, which constitute argument rather than evidence, all of the exhibits are admissible, despite hearsay content, pursuant to Business and Professions Code section 2307, subdivisions (c) and (d), and Government Code section 11513, subdivision (c).

In Exhibit 42, the Deputy Attorney General also argued that Exhibit 41 should not be considered because "Respondent's [*sic*] latest filing was not authorized by the Court . . ." The fact that Exhibit 41 was served as an ex parte communication notwithstanding, it was necessitated by an argument in Exhibit 40 that also was not authorized by the Administrative Law Judge. Therefore, the argument that Exhibit 41 should not be considered is not well taken.

Petitioner's objection to sections II and III of Exhibit 40 is sustained.

Exhibit 39 is admitted.

FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. Petitioner is the holder of Physician and Surgeon Certificate Number G 38687.

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2. By decision effective September 3, 1998, made pursuant to a Stipulated Settlement and Disciplinary Order, the Division of Medical Quality of the Medical Board of California (Board) revoked that certificate, stayed the revocation and placed Petitioner on probation for a period of seven years under various terms and conditions, including but not limited to participation in the Board's Diversion Program, abstinence from drug use, submission to biological fluid testing, surrender of his DEA permit, prohibition against prescribing, administering, dispensing or possessing controlled substances, completion of a prescribing practices course, completion of an ethics course, submission to a psychiatric evaluation and psychotherapy, and retention of a practice monitor. The settlement was based on Petitioner's admissions to most of the allegations in the Accusation in Case No. 05-97-74823 which contained causes for discipline for Prescribing for Self-Use, Unprofessional Conduct, Violation of Drug Statutes, Excessive Prescribing, Prescribing To An Addict, Dishonest Acts, Mentally or Physically Ill Affecting Competency, and Failure to Keep Adequate Records.

3. On January 6, 1999, an Accusation and Petition to Revoke Probation was filed against Petitioner. A First Amended Accusation and Petition to Revoke Probation was filed on March 17, 1999. In that pleading, Petitioner was accused of having violated the terms and conditions of his probation by failing to participate in the Diversion Program, failing to enroll in the prescribing practices course, failing to enroll in the ethics course, failing to provide a plan of monitored practice, failing to pay probation monitoring costs, and failing to pay cost recovery. The case went to hearing in August 1999. In a Decision effective March 13, 2000, the Board adopted the Proposed Decision of an Administrative Law Judge revoking Petitioner's physician's and surgeon's certificate.

4. On January 13, 2004, Petitioner filed a Petition for Reinstatement of Revoked Certificate. The case was heard on May 18, 2004 and, in a Decision effective July 19, 2004, the Board adopted the Proposed Decision of an Administrative Law Judge who granted the petition, revoked the reinstated certificate, stayed the revocation, and placed Petitioner on probation for a period of seven years under various terms and conditions. Pursuant to those terms and conditions, Petitioner was required to:

a. Enroll in a clinical training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California, San Diego, School of Medicine.

b. Refrain from prescribing Schedule I and II controlled substances. He was further prohibited from issuing oral or written recommendations for medicinal cannabis within the purview of Health and Safety Code section 11362.5.

c. Abstain from the use of controlled substances and submit to random biological fluid testing.

d. Enroll and participate in the Board's Diversion Program.

e. Complete an ethics course and a prescribing practices course.

f. Take and pass an oral and/or written examination.

g. Undergo a psychiatric evaluation and psychotherapy.

h. Undergo a medical evaluation and, if necessary, medical treatment.

i. Engage and maintain a practice monitor.

j. Refrain from engaging in the solo practice of medicine.

k. Refrain from supervising physician assistants.

l. Pay costs of investigation and prosecution in a sum no less than $8,000.

m. Pay probation monitoring costs.[1]

5. Petitioner's discipline was the result of his having abused drugs in or around 1997, in order to cope with an extremely busy private general practice. In April 1997, pills prescribed for other individuals and a "bud" of marijuana were found in Petitioner's "fanny pack." Shortly thereafter, he voluntarily entered an inpatient recovery program but was terminated from the program shortly before completion because the staff found him personally difficult to work with. Nonetheless, Petitioner has not abused drugs since 1997.

6. Petitioner has completed the clinical, prescribing and ethics courses, has taken and passed the clinical examination, and has otherwise complied with all of his probationary terms except as follows:

a. Petitioner has not completed payment of the Board's cost recovery. He paid $600 of the cost recovery in September 2006, but he has not had sufficient funds to pay the remainder.

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[1] The conditions at issue in this case are referenced in Paragraph 4, subparagraphs (b), (d), (j) and (k), above. They are Conditions 2, 6, 14 and 16 of the Board's June 17, 2004 order.

b. Petitioner has not enrolled in the Diversion Program because he adamantly objects to participation in a 12-step program that is religiously-based, and which requires him to admit to certain facts he denies, such as being an addict. He made his position known to his Board probation officer early on during his second probationary period and was informed that the Board would locate an alternative program for him that was not based on religious beliefs. However, no such program has been found to date. Petitioner made a few unsuccessful attempts to locate a secular program. However, even if he were successful in locating such a program, he does not believe the Board would find any suggestion he made to be an acceptable alternative to the Diversion Program.

7. The restrictions on Petitioner's license have caused him difficulties in finding employment. He explained that his inability to practice alone and to prescribe Schedule II medications makes him unemployable in an urgent care setting because many urgent care facilities operate with only one physician on duty at a given time, and his inability to prescribe Schedule II drugs could preclude him from properly treating a patient in an emergent situation. The prohibition against supervising physician assistants precludes his employment in any medical facility in which such supervision is a requirement.

8. William J. Alton, M.D. is Petitioner's practice monitor. In a letter in support of the petition, Dr. Alton wrote in part:

> I am a cardiologist practicing in Santa Barbara, California and have served as the practice monitor for Stephen Rifkind since October of 2005. I have monitored Dr. Rifkind just as I would monitor a medical resident or cardiac fellow. Dr. Rifkind sees the patients and then presents their history and physical [examination] findings to me. We then discuss the case and Dr. Rifkind makes his therapeutic decisions. I believe that Dr. Rifkind has done a superb job and that his fund of knowledge in cardiology far exceeds that of the average family practitioner. He has consistently demonstrated excellent skills from both a diagnostic and therapeutic standpoint. Indeed, many of the patients we have seen have been patients that Dr. Rifkind cared for previously in his role as a family practitioner. Virtually every patient has responded extremely positively to Dr. Rifkind on both personal and professional levels. Dr. Rifkind has shown not only superb diagnostic skills, but interacts with patients in a very positive and professional fashion.
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> I believe Dr. Rifkind has clearly demonstrated not only his medical skills, but the fact that he is more than ready to resume the full time practice of medicine.

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Because of restrictions on Dr. Rifkind's ability to practice, he has been virtually unemployable. Over the past 8½ months, he has seen over 1,000 patients and has spent over 250 hours working with me, all of which are completely nonreimbursed. During this period, Dr. Rifkind has maintained a remarkably positive attitude, and I believe without any reservation or hesitation that Dr. Rifkind should be given a second chance to resume the practice of medicine.

Dr. Rifkind's personal life has also been exemplary. He has been involved in a stable, long term relationship with a woman who is widely respected and admired in the Santa Barbara community. Not only has their personal relationship been extremely positive, but Dr. Rifkind has participated in a very active way in multiple fundraising activities and other community projects with her.

The current restrictions on Dr. Rifkind's license (including inability to practice "solo" and the inability to prescribe Class 2 controlled substances) make it virtually impossible for him to find a job in the medical community. I believe it is time to remove these restrictions so that Dr. Rifkind can become a valuable and contributing member of the medical community and can once again be allowed to earn a living. Dr. Rifkind has fully accepted the fact that he has no one but himself to blame for his previous problems. I simply cannot imagine anything more that Dr. Rifkind could do to prove that he is ready, willing and able to return to the full time practice of medicine. I would plead with the Medical Board to give him the second chance that he so richly deserves.

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9. Petitioner also offered a letter from Stephen W. Hosea, M.D. in support of his petition. Dr. Hosea wrote in part:

> As Director of Clinical Care for the Internal Medicine Residency Training Program at Santa Barbara Cottage Hospital, I have had the opportunity to directly supervise the training and progress of physicians in training for the last 25 years.
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> [¶] . . . [¶]
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> [A]s a personal acquaintance of Dr. Rifkind, I can . . . testify to the personal toll that the restrictions on his ability to practice have taken. I believe that Dr. Rifkind is ready to resume full medical practice without restrictions. He should be allowed to practice as a solo practitioner and to prescribe Schedule II drugs. Were he one of my medical residents, I would be ready and willing to send him out into the world without any restrictions. In fact, were I or any member of my family ill, I would be happy for Dr. Rifkind to provide care for us.

10. Michael V. Stulberg, M.D. is a board-certified psychiatrist. He is also certified in Addiction Medicine by the American Board of Addiction Medicine. Dr. Stulberg has been Petitioner's therapist since 1997, and is approved by the Board to serve in that capacity pursuant to the terms and conditions of Petitioner's probationary order.

11. In 1998, Dr. Stulberg was a member of a Diversion Evaluation Committee for the Board's Diversion Program. As such, he evaluated Petitioner for entry into the Diversion Program. Dr. Stulberg determined that Petitioner was not an appropriate candidate for the Diversion Program because he "was *not addicted* to any medication or substance and barely met the criteria for drug abuse." (Emphasis in text.) (Exhibit 39, page 2, lines 3-4.)

12. In his March 22, 2007 Declaration (Ex. 39, pp. 2-3), Dr. Stulberg went on to state:

> 16. Since my first formal evaluation of Dr. Rifkind in 1998, I have continued to make ongoing evaluations based upon my regular (approximately monthly) sessions with Dr. Rifkind.
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> 17. My original conclusions that Dr. Rifkind was not an addict, not an appropriate candidate for the California Medical Board's Diversion program, and that he poses no danger to the public if allowed to return to the practice of medicine have been strengthened by the additional information obtained during my personal observation of Dr. Rifkind over the years since my first evaluation in 1998.

18. I can state definitively, based upon my continuing observation and evaluation of Dr. Rifkind, that he is not, nor has been since I have known him, an addict or psychologically or physically dependent upon any medication, drug or illicit substance.

19. In my many encounters with Dr. Rifkind over the past 10 years since his voluntary entry into the detoxification program at Cottage Hospital, Dr. Rifkind has never demonstrated any evidence of addiction or further drug abuse.

20. I continue to maintain, based upon my professional expertise and judgment, that Dr. Rifkind has been completely rehabilitated from his situational drug abuse problem which occurred in 1997.

21. I continue to maintain, based upon my professional expertise and judgment, that Dr. Rifkind poses no danger to the public if allowed to return to the practice of medicine without restrictions.

22. I continue to maintain, based upon my professional expertise and judgment, that Dr. Rifkind is *not* an appropriate candidate for the Diversion Program based upon the fact that he is not addicted to any substance. (Emphasis in text.)

13. Petitioner requests that his probation be modified to enable him to engage in solo practice. The Deputy Attorney General expressed concern over that modification because Petitioner's drug abuse began while he was in solo practice, and he argued that Petitioner wants to return to solo practice so that he can abuse drugs again. The evidence did not support counsel's argument. On the contrary, the evidence demonstrated an approximate 10-year abstinence from drugs.

14. On September 26, 2006, Dr. Hosea told a Board investigator he had no reservations about Petitioner being permitted to engage in the solo practice of medicine. On October 18, 2006, Dr. Alton told the same investigator that he had never observed Petitioner in an impaired condition, and that he had no concerns about Petitioner's ability to operate a solo practice. Dr. Alton was extremely supportive of this petition. Given the length of time since Petitioner's drug abuse (approximately 10 years), the length of time Petitioner has been sober (approximately 10 years), and the opinions of Drs. Alton and Hosea, Petitioner's request appears to be a reasonable one.

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15. Petitioner requests that his probation be modified to enable him to supervise physician assistants. The Deputy Attorney General argued that, since Petitioner has not shown he can operate his own practice, he should be prohibited from supervising physician assistants. That argument is not well-taken. The various Board orders have precluded Petitioner the opportunity to show he can operate a solo practice. No reason presently exists to prohibit Petitioner from supervising physician assistants. Given the opinions of Drs. Alton and Hosea, Petitioner's request appears to be a reasonable one.

16. Petitioner requests that his probation be modified to enable him to prescribe Schedule II controlled substances. In support of that request, he convincingly pointed out that he is presently permitted to prescribe Schedule III controlled substances which include Vicodin, one of the medications he abused in 1997, and that he has not abused that drug since then despite his ability to prescribe it. Given his present ability to prescribe Schedule III controlled substances and the fact that he has done so since July 2004, without any evidence of relapse, and given the opinions of Drs. Alton and Hosea, Petitioner's request appears to be a reasonable one.

17. Petitioner requests that his probation be modified to enable him to make written recommendations for medicinal cannabis. The Deputy Attorney General argued that Petitioner should not be permitted to do so because Petitioner had been previously caught with marijuana. That argument was not persuasive. A "bud" of marijuana was found in Petitioner's "fanny pack" approximately a decade ago. No evidence was offered at the hearing on the instant petition to show that Petitioner has used marijuana, on even one occasion, since then. Further, the fact that the "bud" of marijuana was found approximately 10 years ago does not demonstrate, or even imply, that Petitioner would abuse the privilege of making medicinal cannabis recommendations now. Those reasons, coupled with the opinions of Drs. Alton, Hosea and Stulberg, make Petitioner's request appear reasonable.

18. Lastly, Petitioner requests that his probation be modified to excuse him from the requirement that he enter the Board's Diversion Program. He bases his request on his spiritual beliefs being extremely incompatible with a program he considers to be religiously based, and on his assertion that he has not been, and is not presently, addicted to any substance. The Deputy Attorney General argued that Petitioner does not want to enter the Diversion Program because he does not want restrictions on his medical practice. That argument is belied by the very nature of this proceeding. Petitioner is not seeking an early termination of his probation. He seeks only relief from five of the numerous terms and conditions of probation.

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19. Given Petitioner's testimony at the hearing, it would be both illogical and counterproductive to order him into the Diversion Program. Initially, regardless of his reasons, if Petitioner is opposed to participating in the program and is resistant to it, it does not take a leap of faith to predict that he will lack the motivation to put forth his best efforts and get the most he can from the program. That lack of motivation would defeat the very purpose of the program. Further, given Petitioner's strong feelings about the Diversion Program's emphasis on 12-step programs and their religious undertones, the Board's inability to locate an alternative program, and the lack of evidence of present addiction, forcing Petitioner into the Diversion Program now would constitute a cruel and irresponsible act.

20. Based on his history over the past 10 years, it does not appear that Petitioner needs the Diversion Program in order to abstain from drugs. That observation is corroborated by Dr. Stulberg who, both while he was on a Diversion Evaluation Committee, and ever since, has opined that Petitioner is not a candidate for the Diversion Program because he is not an addict, and because his drug abuse in 1997 was "situational."

21. Those reasons, coupled with the opinions of Drs. Alton and Hosea, make Petitioner's request appear reasonable.

22. Further evidencing Petitioner's rehabilitation is the fact that, on April 14, 2004, he was admitted as a member of The State Bar of California. Petitioner presently operates a small, part-time, solo law practice.

LEGAL CONCLUSIONS

Petitioner has established, by clear and convincing evidence to a reasonable certainty, that cause exists to grant the Petition under the provisions of Business and Professions Code section 2307, by reason of Findings 4 through 22.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The Petition of Stephen Paul Rifkind, M.D. for modification of his probation is granted.

2. Probationary terms Nos. 2, 6, 14 and 16 of the Board's Order dated June 17, 2004, and effective July 19, 2004, in Case No. 20-2004-154724, are terminated. All other probationary terms and conditions remain in full force and effect.

DATED: April 23, 2007

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings